

Jan. 23. 1781.

MEMORIAL

FOR

JOHN ALEXANDER of M'KILSTON,

AGAINST

CATHARINE GERRAN, Spouse to JAMES
M'KIE Merchant in Stranraer, and the said JAMES
M'KIE for his Interest.

THE deceased John Alexander of M'Kilston, by his last will and testament of date the 16th May 1773, appointed the memorialist to be his sole executor, he having previously settled his land-estate upon the memorialist his proper representative, being the eldest son of M'Kilston's eldest niece.

In that last will and testament, M'Kilston left a variety of legacies; amongst which, one to his niece Catharine Gerran and her children is conceived in the following words: "I leave to Catharine Gerran, spouse to James M'Kie merchant in Stranraer, the sum of L. 300 Sterling, in liferent *alimentary*, and to be divided by her among her children at any time before her death; and, failing of her dividing the above sum, it is to be divided by the heirs and representatives of the said John Alexander as they shall think proper."

The said Catharine Gerran, and her husband for his interest, having brought a process against the memorialist for payment of

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this legacy, settled in the way and manner that the clause now recited has done, and the same having come in course of the rolls before Lord Braxfield Ordinary, it was stated for him, That he was ready and willing to pay the money, if the Lord Ordinary should find that the pursuers had a right to receive and discharge it; but as it appeared to him that the pursuers had no other right than a bare liferent, he did not think himself safe to pay it to them without the authority of a judge.

Jan. 27. 1780. The Lord Ordinary, after hearing counsel on both sides, was pleased to ordain parties to give in memorials upon the points in dispute, and to see and interchange the same.

At an after-calling, his Lordship suggested, that it would be proper the children procreate betwixt the saids James M'Kie and Catharine Gerran were made parties to the process. A summons of multiplepinding was therefore raised in name of the memorialist, and executed against John, James, William, Thomas, Agnes, Catharine, Margaret, and Jean M'Kies, all children of said Catharine Gerran; and David Laurie merchant in Donaghadee, husband to the said Agnes M'Kie, for his interest; and against the said James M'Kie, as administrator in law for his children. This process of multiplepinding was called before Lord Westhall, and was remitted to and afterwards conjoined with the present process; but in which no appearance has been made for the children, most of whom are minors.

Dec. 5. 1780. The Lord Ordinary having again advised the mutual memorials, and having called the cause, the Lord Ordinary made avifandum therewith to your Lordships, and ordained parties to put printed copies thereof in the Lords boxes: In obedience to which order, what follows is humbly offered on the part of the defender.

That there is an essential difference between a right in fee and a right in liferent, is certainly a very plain proposition; and had it not been for some decisions pronounced by this Court, it might with much appearance of reason be argued, that in no case whatever can a person be held as fiar to whom a subject, whether heritable or moveable, is conveyed only in liferent.

It must, however, be admitted, that since the decision 25th November 1735, Children of Robert Frogg *contra* his Creditors, one to whom *heretable property* is disposed in liferent, and to his children in fee, is held to be fiar, though *ex figura verborum* he has only

only the liferent ; and accordingly, the Court has followed that construction of the words in some cases which have since occurred.

But, although that construction has been adopted in interpreting settlements of landed property, originally, it is believed, from a notion which Mr Erskine plainly says appears to have no foundation either in nature or in law, *viz.* that *dominium non potest esse in pendente*, and afterwards upon the wise principle that the interpretation of any clause in settlements should be uniform and certain, yet the Court has not tied itself down to the same interpretation of the clause in settlements of *moveable property* or sums of money.

Erskine's
Instit.
p. 152.

For the memorialist believes that no instance of that interpretation can be pointed out, except a single decision pronounced above a century ago, to be found in the Dictionary, *voce* FIAR, in these words: " A sum being payable to a husband, in name of tocher, to be employed to himself and his wife in liferent, and to the heirs of the marriage, was found assignable to or arrestable by his creditors as being fiar thereof ; Gossford, 10th February 1672, Wemyss and his assignee *contra* M'Intosh."

The late case, Mrs Margaret Porterfield and her children, which was decided in this Court, and affirmed in the House of Lords, will no doubt be founded upon by the pursuers. But, in the memorialist's humble apprehension, that case was by no means a decision upon the import of the word *liferent* in contradistinction to *fee* in a settlement of money, but went upon the general meaning and intention of the deed. Dr Porterfield had assigned and transferred to and in favour of the said Margaret Porterfield his daughter in liferent, and to the heirs of her body in fee, certain sums of money ; and although her children contended that by those words she had only a right of liferent, the Court found her to be fiar. But it will be kept in mind, that the deed not only proceeded upon the express narrative of love and favour to his daughter, but contained the following clause: " Declaring always, that these presents are granted by me, and to be accepted by the said Margaret Porterfield, with the burden of the payment of all my just and lawful debts and funeral charges, and all legacies that shall happen to be left by me at my death."

That case, therefore, was a case of circumstances, and no a simple determination upon precise words. So that, with submission,

mission, it can by no means be held as a judgment upon the interpretation of the phrase *in liferent*, when it occurs in a settlement of moveable property.

On the other hand, the opinion of the Court upon the phrase, when taken simply by itself in a settlement of moveables, was in a very recent case directly the reverse of what is contended for by the pursuers, as appears from a decision in Mr Ogilvy's Collection, July 28th 1778, *Turnbull against Turnbull, &c.*; which, so far as respects the point now at issue, was as follows. George Turnbull burdened his nephew with a provision of 2000 merks, to Janet Turnbull his niece *in liferent*, and to her children *in fee*. After the death of Janet and her children, a competition arose between the nearest of kin of Janet and the nearest of kin of her children, which of them should succeed to this legacy. The Court preferred the nearest of kin of the children; which was in other words determining, that the fee of the money was in them, and not in their mother.

It is therefore humbly thought, that the plain and natural meaning of the word *liferent* will be adopted, especially in giving effect to a last will and testament, holograph of a Galloway laird, who must be supposed to have meant it in its obvious sense.

It may be argued, that M'Kilston's testament obliges his executor to pay all the legacies within six months after his death. But besides the consideration that the testament is inaccurately and confusedly expressed, your Lordships will understand the obligation to pay within six months, to apply only to such legacies as were not specially settled in a former part of the will in such a way as that it would be an absolute contradiction to suppose them payable within that period. Now it will be observed, that the capital of the legacy in question is clearly meant to be reserved as a divisible fund among the children of Mrs M'Kie: for it is specially mentioned, that the sum is "to be divided by her" among her children at any time before her death; and then follows an eventual privilege upon which the memorialist is entitled to plead, which is in these words, "and failing of her dividing the above sum, it is to be divided by the heirs and representatives of the said John Alexander as they shall think proper." Are not these clauses altogether exclusive of the supposition that the pursuers should be entitled to receive the money *de presenti*?

Besides

Besides all this, it will be kept in view, that in the present case, not only are there no circumstances indicating an intention that the fee should actually be in the mother, though the expression be *in liferent*; but even the phrase "liferent" is *limited* in its meaning by the addition of the word *alimentary*: M'Killston leaves the sum, so far as concerns Catharine Gerran, only in "*liferent* *alimentary*." Now, it surely will not be maintained, that it is not in the power of a testator explicitly to provide, that one person named by him shall literally and truly have no more than a *liferent* of a sum destined by him to be divided among others after that person's death. No lawyer will deny, that if a sum of money is provided to one in *liferent* *alienarily*, he will not be held as *fiar*; and it is submitted to your Lordships if "*in liferent alimentary*" be not as clearly restrictive? It is very common to settle an annuity as an *alimentary* provision, that it may not be affectable by creditors; and indeed the memorialist cannot well conceive a form of words that can with less ambiguity ascertain a simple *liferent-right* than the very words used here, *in liferent alimentary*.

It will perhaps be said, that as the children, though cited, do not appear in this process, it must be supposed that they have no objection to the money, which appears to be provided to them in fee, being paid to their father. But your Lordships will observe, that most of the children are minors, and several of them very young and altogether under the management of their father. In these circumstances, the memorialist submits to your Lordships, if the father can legally give his authority, as administrator-in-law for his children, to a deed by which their property is to be put entirely in his power; though the late M'Killston appears to have guarded against its ever coming into his hands, by restricting the interest of Catharine Gerran to an *alimentary liferent*.

The memorialist, who has all along wished that the pursuers would accept of the interest of the money, the *alimentary liferent* of his aunt, has very little interest in the matter, farther than being reasonably desirous to have a proper attention to the will of the dead, and to pay without running any risk of being obliged to pay over again. He therefore shall cheerfully acquiesce in whatever judgment shall be pronounced.

In respect whereof, &c.

JAMES BOSWELL.